TABLE OF CASES

	Page
30 Am. Jur. 911	7
34 C. J. 868	6
City of Davenport v. Allen, 120 Fed. 172	7
Fritsch Fdry. & Mach. Co. v. Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136	7
Fulton v. Gesterding, 47 Fla. 150, 36 So. 56	6
Henrietta Nat'l. Bank v. Barrett, 25 S. W. 456 (Texas)	7
Kirkpatrick v. McElroy, 7 Atl. 647 (N. J.)	7
Olds v. Alvord, 139 Fla. 745, 191 So. 434	2
Olds v. Town of Belleair	5
Russell v. Place, 94 U. S. 606, 24 L. ed. 214	6
Stanley v. White, 43 N. E. 729 (Ill.)	7
Water Light & Gas Co. v. City of Hutchinson, 160 Fed. 41	7

In the Supreme Court of the United States

OCTOBER TERM, 1941

JOHN C. GETZ, et al.,
Petitioners,

v.

TOWN OF BELLEAIR,
a municipal corporation,
Respondent.

TOWN OF BELLEAIR,
a municipal corporation,
Cross Petitioner,

v.

JOHN C. GETZ, et al.,
Cross Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF CROSS PETITION

The Cross Petition for Writ of Certiorari filed by the Town of Belleair (p. 10) states that jurisdiction of this Court is invoked

> "upon the grounds that the United States Circuit Court of Appeals has refused to observe and follow decisions of the Florida Circuit and Supreme Courts upon a question of fact therein litigated and finally adjudicated".

On page 9, under the heading, "Questions Presented", it says that

> "the Circuit Court of Appeals has refused to be bound by and to observe and follow a decision and determination of a question of fact duly litigated and decided by the Supreme Court of the State of Florida."

These statements are general, and since they do not indicate in what way the Circuit Court of Appeals has refused to follow the State Court, it is necessary to analyze the Petition, and to look to the Brief of Respondent, Town of Belleair, in opposition to our Petition for Certiorari; the Cross Petition (p. 15) refers to the Brief for a discussion of one of the grounds upon which the Cross Petition rests.

The Cross Petition really rests upon two assumptions: (1) that *Olds v. Alvord*, 139 Fla. 745, 191 So. 434, decided by the State Courts of Florida, was "properly a class suit", so that the original Petitioners, Getz, et al., as members of a class are bound by the decision of that case, even though they were not parties thereto; (2) that the Florida Court in *Olds v. Alvord*, supra, has adjudicated not only (a) that the bonds of the Petitioners are void and that they cannot recover on them as such, but also (b) that the proceeds received from the sale of the bonds were expended by the Town for an illegal purpose,—to wit, for the benefit of a private corporation,— so that Petitioners cannot recover

a judgment against the Town upon a common count for money had and received. Since the record shows that these Plaintiffs (Petitioners) were not parties to the suit of *Olds v. Alvord,* supra, both of these assumptions depend upon whether or not *Olds v .Alvord* was in fact "properly a class suit". Before discussing the two assumptions, we call the attention of the Court to the Brief filed in opposition to the granting of our Petition (by reference really made a part of the Cross Petition) which actually supports our contention that the Petition for Certiorari should be granted.

That Brief is one of confession and avoidance; it does not seriously attempt to answer the reasons upon which the Petition rests but avoids the issue, by saying that even if the Circuit Court of Appeals did err in saying that the decision of the Florida Court in *Olds v. Alvord,* supra, was "conclusive as authority" and that it was "bound to follow it", the decision of the Court was correct, because Getz, et al. were bound by the rule of *res judicata.* They were bondholders, and were, therefore, members of the same class as Olds and Newberry, who were parties to the suit. This argument is an acknowledgement that our Petition should be granted, for the Circuit Court of Appeals said, "We do not decide" whether *Olds v. Alvord* was "properly a class suit".

For this Court to deny the Petition for Certiorari for the reasons given by the Town, would amount to a *decision* that *Olds v. Alvord was "properly a class suit"* without these Petitioners having been accorded an opportunity to

be heard on this question of law; it would have the effect of affirming the holding of the Circuit Court of Appeals, and thus make it the law of Federal Courts of the Fifth Circuit. The only question now before this Court is whether it should take jurisdiction of the case; the merits of the case are not now involved. This Court does not decide the questions of substantive law involved in the case upon application for a Writ. It determines only whether those questions *are of such character* as to justify this Court in taking jurisdiction. If the Writ is issued, the parties have an opportunity to be heard upon the merits.

Since the Circuit Court of Appeals expressly held that

> "whether that litigation (*Olds v. Alvord*) was properly a class suit to which all bondholders everywhere were parties, and whether as a result all suffered a loss of their bonds, is an interesting question, and, we think, one of grave doubt",

that statement is not ground for Certiorari. This Court does not sit to review what the Court of Appeals *did not decide*, but only what it *did decide*. Since the Court of Appeals did not decide this question, it is not a matter that this Court will review. It might become involved in a consideration of the merits if the Petition for Certiorari is granted. The Petition of these Plaintiffs is necessarily predicated on the claim that their rights were not adjudicated in the State Court, as well as upon the claim that the Court of Appeals was not conclusively bound to follow the decision of the Supreme Court of Florida. In fact, the Petition goes farther. It contends that if the decision of the Florida Court be construed as having adjudicated the rights of these Petitioners, such adjudication constitutes

a denial of due process, in violation of the Fourteenth Amendment to the Constitution of the United States. We submit, therefore, that the claim that *Olds v. Alvord* was "properly a class suit" is not a reason for *denying the original Petition for Certiorari.*

Claim of Cross Petitioner that the Circuit Court of Appeals did not follow decisions of the Florida Courts.

The complaint of the Cross Petition that the Florida Court did not follow decisions of the Florida State Courts is, as we have already stated, predicated on the assumption that the Florida Court, as the Cross Petition says, has "finally determined" a question of fact, namely, that these Petitioners cannot recover upon a common count for money had and received by the Town from the sale of its bonds. Necessarily, no such question of fact could have been adjudicated against these Petitioners if they were not parties to the suit in the State Court. The Circuit Court of Appeals held that

> "even if the decree in *Olds v. Alvord* binds this appellant as a class party, *it did not adjudicate the use of the proceeds for the benefit of private corporations, as we held in Olds v. Town of Belleair,* supra."

In so deciding, the Circuit Court of Appeals *followed Florida decisions;* for in *Olds v. Belleair,* a companion case, decided the same day, it held that

> "the issue as to the private object and use of proceeds of these bonds dropped out of the case (*Olds v. Alvord*) and was unnecessary to be considered, and *was in fact*

not decided in this final decree. That decree superseded the other. No issues were finally adjudged so as to make estoppel by judgment in a suit *on another cause of action* except those necessarily or actually decided in the final decree."

In making this statement, the Circuit Court of Appeals also followed the Florida Court. It followed a leading decision by that Court, as well as *Russell v. Place,* 94 U. S. 606, 24 L. ed. 214, a decision of this Court. In *Fulton v. Gesterding,* 47 Fla. 150, 36 So. 56, cited by the Circuit Court of Appeals, the Florida Court held:

> "The rule supported by reason and the weight of authority, constrains us to hold that *if it appears from the record of a former judgment offered in evidence as an estoppel that several distinct matters may have been litigated,* upon one or more of which the judgment was rendered, *the whole subject matter of the action will be at large and open to a new contention unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined."*

It cannot be denied that in *Olds v. Alvord* two distinct reasons were made the basis of attack upon the validity of this issue of bonds by the Town of Belleair; nor did *Olds v. Alvord* in any way determine the right of a bondholder whose bonds were void to recover from the Town upon a common count. In order for a judgment to have the conclusive effect referred to in Cross Petitioner's quotation from 34 C. J. 868 (p. 14 of the Cross Petition) it is a condition precedent that the first judgment should be upon *"the same claim, demand or cause of action".* Where the second suit does not involve "the same claim, demand and

cause of action", the first judgment is not a *conclusive bar*, but is, as the Court of Appeals said, a bar only to those issues of fact which were *"necessarily or actually decided"*. *Water Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41; *City of Davenport v. Allen*, 120 Fed. 172; *Kirkpatrick v. McElroy*, 7 Atl. 647 (N. J.); *Henrietta Nat'l. Bank v. Barrett*, 25 S. W. 456 (Texas) *Fritsch Fdry. & Mach. Co. v. Goodwin Mfg. Co.* 100 Mo. App. 414, 74 S. W. 136.

The rule of *res judicata* is primarily intended to produce certainty and to give dignity to judicial proceedings, 30 Am. Jur. 911. The Courts do not look with favor upon an extension of its use to cases where there is doubt. Hence, the burden of proving that the prior judgment has *conclusively determined* an issue involved in a second suit rests upon the defendant who asserts that defense, *Stanley v. White* 43 N. E. 729 (Ill.), and according to *Russell v. Place*, supra, the defendant must make it appear, either from the face of the record or by extrinsic evidence, "that the precise question was raised and *determined*" in the former suit. If there was any "uncertainty on the record", or if "the record leaves the matter in doubt", Defendant had the right to offer extrinsic evidence "showing the precise point involved and *determined*" in the former suit. If no such extrinsic evidence was offered, the question is determined solely from an examination of the record. As the Florida Court so clearly held, if there be several matters litigated, upon either of which the judgment might rest, the whole subject matter of the action will be at large and open to a new contention.

The Circuit Court of Appeals determined affirmatively that the issue of the use of the proceeds of the bonds *was*

not decided by the Florida Court in its final decree in *Olds v. Alvord.* A reading of the opinion of the Florida Court in 191 So. 434, with the final decree referred to by the Circuit Court of Appeals (which is not in the record but which is referred to on page 7 of the Cross Petition) sustains the statement of the Circuit Court of Appeals that this issue was not necessary to be considered by the State Court and was actually not decided by it.

Cross Petitioner cannot by the records above show that the Florida Courts did decide this issue of fact. Its Brief and Petition show that it relies upon deductions, or its own conclusions drawn from the records. This is an admission that there is doubt and uncertainty which, the Florida Court holds, opens the subject matter for a new contention.

The Cross Petition admits that the question of whether the proceeds were used for a legal purpose is a question of fact (p. 11). *Olds v. Town of Belleair,* a companion case to this one, decided the same day, and referred to in the opinion of the Circuit Court ofAppeals for trial of the facts in the District Court, to determine whether

> "there be any relief available under Florida law growing out of the retention or use of Olds' money for municipal purposes",

was tried by the District Court September 8, 1941, resulting in a judgment for the Plaintiff, Olds. The evidence necessarily proved that the money received from the sale of the bonds *was used for a legal municipal purpose*; otherwise the District Court would have rendered judgment for

the Defendant. It would be an anomalous situation for this Court to hold that the decree of the Florida Court in *Olds v. Alvord* of itself conclusively established that the proceeds received from the bonds were used for an illegal purpose, where at a trial of that issue the District Court has adjudicated that they were not.

In conclusion, we call attention to the fact that the Court of Appeals, in holding that the Florida Courts did not adjudicate that the proceeds of the bonds had been used for the benefit of a private corporation, did not refuse to follow decisions of the Florida Court. It followed the rule announced by the Florida Supreme Court in *Fulton v. Gesterding*, supra. It examined the record in the case of *Olds v. Alvord*, and held that under the decisions of the Florida Court, Defendant, Town of Belleair, had not proved its defense. The Cross Petition for a Writ of Certiorari to review that conclusion is merely an application for a review of what is claimed to be an erroneous decision of the Circuit Court of Appeals. This Court does not grant petitions for that purpose unless there are special circumstances that bring the case within the Rules of this Court. The Petition does not purport to show that there are any such special circumstances.

GILES J. PATTERSON,
Attorney for Cross Respondents.